is now regarded as a vested property right.[18] Moreover, it has been held that one class of stock cannot be reduced without a proportionate reduction of other classes.[19] It would seem to follow that one class cannot be increased without a proportional increase in the other. It is no answer that the stockholder may buy enough stock in the market to place his holdings in its old relation to those of other stockholders who have enjoyed the benefit of the increase, for his class of stock is not thereby protected from the increased majority of other classes which may have other interests to advance. It is clear that the New York court was correct in denying the plaintiff a share in the surplus through a pre-emptive right to the common stock;[20] but though the relief granted by its conditional decree perhaps gave the most complete remedy which the pleadings of the parties would permit, still the voting power of the preferred stockholders as a class was diminished and their rights to that extent violated.

POWER OF A CORPORATION TO PURCHASE ITS OWN STOCK.—The question whether a corporation has the power to purchase in good faith shares of its own capital stock has caused a wide divergence of opinion among courts and legal text-writers. Many eminent authorities have denied the existence of such a power,[1] and many others have in unequivocal terms affirmed it.[2] The former view seems to be in every case based upon one of three theories. Such a purchase is said either to be illegal because in violation of the rights of corporate creditors or of non-assenting stockholders, or to be *ultra vires*.

The first of these objections proceeds upon the theory that the capital fund of the corporation is similar to a trust fund, upon the security of which creditors have relied, and that the latter have an absolute right to demand that the fund be kept intact for the purpose of paying their debts. Under this view a purchase of the capital stock, since it in fact decreases the fund, must be analogous to a breach of trust.[3] It would seem, however, that corporate creditors should not have any absolute right to treat the capital fund as a trust fund for their security. The corporation is in the same situation as an individual, and no more substantial reason appears why its creditors should have a lien on its property than in the case of the creditors of a natural person.[4] A totally different question is pre-

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[18]Lord *v.* Equitable Co. (N. Y. 1905) 47 Misc. 187; Smith *v.* Railroad Co. (1894) 64 Fed. 272; Commonwealth *v.* Dalzell (1893) 152 Pa. 217.

[19]Page *v.* Mfg. Co. (N. Y. 1908) 129 App. Div. 346.

[20]See Niles *v.* Mfg. Co. (1913) 48 N. Y. L. J. No. 89.

[1]1 Morawetz, Private Corporations, § 112; 1 Machen. Corporations, § 626; Maryland Trust Co. *v.* Natl. Mechanics' Bank (1905) 102 Md. 608; Trevor *v.* Whitworth (1887) L. R. 12 A. C. 409.

[2]1 Cook, Corporations, § 312; Chicago etc. R. R. *v.* Marsailles (1877) 84 Ill. 643; Hartridge *v.* Rockwell (Ga. 1828) R. M. Charlton 260; Leonard *v.* Draper (1905) 187 Mass. 536.

[3]1 Morawetz, Private Corporations, § 112; Crandall *v.* Lincoln (1884) 52 Conn. 73; Trevor *v.* Whitworth *supra*.

[4]Graham *v.* Railroad Co. (1880) 102 U. S. 148, 161; McDonald *v.* Williams (1899) 174 U. S. 397; O'Bear Jewelry Co. *v.* Volfer Co. (1894) 106 Ala. 205, 213.

sented, however, in case of the insolvency of the corporation,[5] for then a lien in favor of creditors may well arise, and any conveyance of property after insolvency or in contemplation thereof can be set aside upon familiar equitable principles.[6]

Again, it is urged that the corporate power under consideration is illegal because it may operate to the injury of continuing and non-assenting stockholders. It is argued that such a purchase decreases in fact the number of shares, at least until reissued, and thus fortifies the power and position of large stockholders at the expense of the smaller ones;[7] and furthermore, that such a purchase prefers certain favored stockholders at the expense of a non-assenting minority.[8] It is axiomatic, however, that minority stockholders are bound by corporate acts unless such acts are either *ultra vires* or illegal,[9] and it is submitted that it begs the question to thus premise the illegality of an otherwise valid corporate act upon the dissent of minority stockholders. Moreover, this view would seem to work no hardship upon the minority, for if the transaction be tainted with fraud, it may be successfully attacked in equity.

Furthermore, it is said that a purchase by a corporation of its own stock is *ultra vires,* since such a power is not reasonably necessary to the exercise of the corporate functions.[10] The courts which adhere to this rule recognize several exceptions to it, and it is believed that a consideration of these will reveal the germ of its unsoundness. It is universally recognized that a corporation may receive its own stock in payment of,[11] or as security for[12] an antecedent debt; or in compromise of a disputed claim;[13] or by way of gift or devise.[14] It will be noted that, in the first three at least of these exceptions, the corporation is allowed to take its own stock, though its taking in such cases in fact amounts to a purchase, for the purpose of protecting itself.[15] In other words, in these situations the courts recognize that the purchase of its own stock may be reasonably necessary to the exercise of the functions of the corporation. And having once admitted such a possibility, it seems inconsistent to arbitrarily hold that in the above situations alone is this power reasonably necessary. Moreover, such an arbitrary distinction seems plainly contrary to fact. And this result is not effected by statutes whereby a corporation is prohibited from reducing its capital stock except in a specified manner. Although it has been held that such prohibition forbids the purchase of its own

[5]See Hollins *v.* Brierfield Coal & Iron Co. (1893) 150 U. S. 371, 383; see Graham *v.* Railroad Co. *supra.*

[6]See McDonald *v.* Williams *supra.* A different question arises in cases where a statute imposing a liability upon individual stockholders for corporate debts is under consideration.

[7]1 Machen, Corporations, § 626.

[8]Lowe *v.* Pioneer Threshing Co. (1895) 70 Fed. 646.

[9]2 Machen, Corporations, § 1296.

[10]Zulueta's Claim (1870) L. R. 5 Ch. App. 444; Trevor *v.* Whitworth *supra;* Coppin *v.* Greenlees & Ransom Co. (1882) 38 Oh. St. 275.

[11]Morgan *v.* Lewis (1888) 46 Oh. St. 1.

[12]See Savings Bank *v.* Wulfekuhler (1877) 19 Kan. 60, 65.

[13]State *v.* Building Assn. (1879) 35 Oh. St. 258.

[14]Rivanna Nav. Co. *v.* Dawsons (Va. 1846) 3 Gratt. 19.

[15]Morgan *v.* Lewis *supra.*

shares by a corporation, the contrary view would seem more sound, since such a purchase does not merge the stock, which may be reissued.[16]

In the recent case of *Wilson* v. *Torchon Lace & Mercantile Co.* (Mo. 1912) 149 S. W. 1156, the plaintiff sought specific performance of a contract under which he had purchased stock in the defendant corporation, and by which the latter had agreed to repurchase the same at the plaintiff's option. The court refused relief, holding that a corporation has no power to contract to purchase its own stock,[17] and that since the plaintiff had received and disposed of dividends, he did not come into equity with clean hands. Since the transaction was in good faith and the corporation was solvent at the time, the first part of this decision, at any rate, seems contrary to the better view, and moreover, it is opposed to the weight of authority.[18]

APPLICABILITY OF THE DOCTRINE OF PART PERFORMANCE TO EXECUTED TRANSACTIONS.—The question of the applicability of the equitable doctrine of part performance to cases of executed transactions is raised in the late case of *Tyler Commercial College* v. *Stapleton* (Okla. 1912) 125 Pac. 443. The defendant, who had taken a parol assignment of a lease from the lessee and had entered into possession, abandoned the premises before the expiration of the lease. The court allowed the lessor to recover the rent for the balance of the term,[1] holding that going into possession constituted sufficient part performance to take the case out of the Statute of Frauds. This holding invites inquiry into the true basis of the doctrine of part performance.

As a conveyance is by its nature not executory but completely executed at the time when made, there can obviously be no performance of it, and the expression "part performance" is clearly inaccurate, therefore, when used as a basis for equitable jurisdiction to enforce a gift, lease or assignment made by parol.[2] The expression would seem to be as much of a misnomer, however, when applied to executory contracts; for in the ordinary contract for the purchase of land, where

[16]Ralston *v.* Bank of California (1896) 112 Cal. 208; Hartridge v. Rockwell *supra;* Comm. v. B. & A. R. R. Co. (1886) 142 Mass. 146; City Bank of Columbus v. Bruce (1858) 17 N. Y. 507. It is suggested that a purchase of its stock by a corporation is analogous to the purchase for value and before maturity of a negotiable instrument by its maker and its subsequent reissue by him. Stock thus purchased may not be voted, however. American Ry. Frog Co. *v.* Haven (1869) 101 Mass. 398; M'Neely *v.* Woodruff (1833) 13 N. J. L. 352.

[17]In this connection the case of Vent *v.* Duluth Coffee & Spice Co. (1896) 64 Minn. 307 is of interest. In that case it was held that an agreement similar to the one in the principal case was a conditional sale rather than an agreement to repurchase, and was consequently valid.

[18]Iowa Lumber Co. *v.* Foster (1878) 49 Ia. 25; First Nat. Bank *v.* Peoria Watch Co. (1901) 191 Ill. 128; Dupee *v.* Boston Water Power Co. (1873) 114 Mass. 37; Chicago R. R. *v.* Marsailles, *supra;* Hartridge *v.* Rockwell *supra;* Pabst *v.* Goodrich (1907) 133 Wis. 43.

[1]*Accord,* Dewey *v.* Paine (1886) 19 Neb. 540; Carter *v.* Hammett (N. Y. 1851) 12 Barb. 253; *cf.* Edwards *v.* Spalding (1897) 20 Mont. 54; Baker *v.* Maier (1903) 140 Cal. 530; but see Chicago etc. Co. *v.* Davis etc. Co. (1892) 142 Ill. 171; Welsh *v.* Schuyler (N. Y. 1876) 6 Daly 412.

[2]1 Tiffany, Landlord & Tenant, 258; Banerji, Specific Relief, 26.